



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-95-1

FACTS:

You are the Executive Director of the Waltham Community Access Corporation, a non-profit corporation (Corporation), organized in accordance with §501(c)(3) of the Internal Revenue Code. The Corporation was not established by vote of the city council or by ordinance, but rather was incorporated in response to the cable license agreement executed between the City and the local cable company. According to the Waltham Cable License Agreement, the Corporation has responsibility to manage the local access channels and insure that all Waltham residents, businesses and organizations have a reasonable opportunity to utilize the access facilities of the cable television system. The Corporation is responsible for all community programming, including program production and allocating capacity and time on the channels.

Under the License Agreement, the cable company agreed to designate 10% of its channel capacity on the subscriber system for public, educational and municipal access. Each channel is to be activated at the discretion of the Corporation, according to rules and regulations established jointly by the Corporation and the cable company. At least one of the channels is dedicated to municipal uses, and the City determines such uses. The cable company maintains the local access channels free of charge to local residents, city departments and organizations. Operating rules for these channels are established by the Corporation in conjunction with the cable company and the City. The Corporation is responsible for staffing and supervision at the studio, community education, training of local citizens in the use of the system, local ordinance programming, and program generation.

Under the License Agreement, the cable company agreed to provide monies to the Corporation and the schools to defray operating expenses and to assist in capital expenditures. The present agreement requires the cable company to give 4% of its gross revenues to the Corporation in each year of operation. Additionally, the cable company agreed to pay a maximum of \$572,000 for capital equipment purchases over the term of the license. The cable company also purchased a mobile van which is capable of remote programming and established a complete studio centrally located in downtown Waltham. The City provides no funding or municipal resources to the Corporation. The Corporation raises additional revenue through fundraising events, such as auctions, and fees which it charges. The Corporation rents space, pays for its utilities, compensates its employees, and retains legal counsel. You state that, should the Corporation dissolve, the City does not have a reversionary interest in any of the assets of the Corporation.

The Corporation is governed by a Board of Directors which is appointed by the Mayor. The Board also includes one ex officio member selected by the cable company. Other than the power to appoint Board members, the Mayor has no other decision-making role in the Corporation.^{1/} Under the Corporation bylaws, the Board may, by majority vote, with or without cause, remove a member from the Board. The Board has full power to manage and control the property and affairs of the Corporation, including full authority with respect to the distribution and payment of money received by the Corporation. The Board is not required to report its actions to the Mayor, nor does the Mayor play a role in reviewing the Board's actions, except that the cable company files with the City an annual report which describes the state of the local programming.

You indicate that, in 1988, at the recommendation of the City Solicitor's Office, the City Council designated the Board to be special municipal employees under the conflict of interest statute.^{2/} The Board questions whether you, as a Corporation employee, are a municipal employee under the conflict of interest law. You were hired by the Board. You have never received any compensation or benefits from the City. Corporation employees are not eligible for a municipal pension, municipal union membership, or authorized to use municipal vehicles.

QUESTION:

Are you, as Executive Director of the Waltham Cable Access Corporation, a “municipal employee” as defined by Chapter 268A, §1(g)?

ANSWER:

No, because the Waltham Cable Access Corporation is not a “municipal agency” as defined by chapter 268A, §1(f).

DISCUSSION:

G.L. c. 268A, §1(g) defines a municipal employee as “a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.” G.L. c. 268A, §1(g).

In order to determine whether you are a municipal employee within the statutory definition, we must consider whether the Corporation is a “municipal agency” under the conflict of interest law.

Municipal agency is defined in G.L. c. 268A, §1(f) as “any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.”

Prior opinions of the Commission have identified several criteria useful to an analysis of whether a particular entity is a public instrumentality for the purposes of G.L. c. 268A. These factors are:

- (a) the impetus for the creation of the entity (e.g. legislative or administrative action);
- (b) the entity’s performance of some essentially governmental function;
- (c) whether the entity receives or expends public funds; and
- (d) the extent of control and supervision exercised by governmental officials or agencies over the entity.

See *EC-COI-94-7*; *89-24*; *89-1*. The Commission also considers whether, in light of the preceding factors, “there are any private interests involved, or whether the states or political subdivisions have the powers and interests of an owner.” See *MBTA Retirement Board v. State Ethics Commission*, 414 Mass. 582 (1993). For the following reasons, we conclude that the Corporation is not a municipal agency whose members and employees are subject to the conflict of interest statute.

In 1988 the Ethics Commission addressed the question of whether a similar local access cable corporation was a municipal agency under the conflict law and concluded that the particular cable access corporation was not a municipal agency. *EC-COI-88-19*. In *EC-COI-88-19*, the Commission concluded that the local access corporation was not governmentally created, as the impetus for the creation was the License Agreement between the city and the cable company, as opposed to a rule, regulation, statute, or ordinance. Further, the Commission found that the local access corporation’s management of the local access channels, while a public service, was not an essential governmental function. According to the Commission “public television scheduling and production are neither traditional nor exclusive roles of government.” *EC-COI-88-19*.

We reaffirm our conclusions that the management of local access channels by a non-profit organization

is not an essential governmental function, and that, absent a rule, regulation, statute, or ordinance, an organization established as a result of a contract between a City and a private company is not governmentally created. *See e.g., MBTA Retirement Board v. State Ethics Commission*, 414 Mass. at 589-590 (no governmental creation where there is no statute, regulation or executive order addressing establishment of fund and board which arose from trust instrument); *EC-COI-94-7*; *93-2* (non-profit created in response to lease; no governmental creation); *84-65* (no governmental creation where entity created by terms of will).

Turning to the third factor, concerning the amount of public funding, we do not find, under our jurisdictional test, that the Corporation receives significant public funding. The City provides no City funding or municipal resources to the Corporation. *See EC-COI-93-2* (Corporation privately financed and will not expend or receive county funds). Further, considering the private interests involved, we find that these private interests outweigh any interest of the City. *See MBTA Retirement Board*, 414 Mass. at 591 (“analysis of [public funding] factor,...should focus on the use of the public funds received by the entity in question, taking into consideration the private interests involved”). The Corporation has full authority to manage and expend its funds, within the parameters of its contractual obligations, bylaws and articles of organization, without oversight by the City. The City has no proprietary interest in the assets of the Corporation and has no right to receive any of the assets upon dissolution of the Corporation. *See Id at 591. Compare, EC-COI-94-7* (public funding found where state provided non-profit with substantial funding, audited non-profit’s organization’s financial records, and maintained an interest in how funds were expended).

The final consideration in our analysis is the degree of control and supervision exercised by governmental officials over the Corporation. In *EC-COI-88-19*, the Commission found no government control of the local access corporation because, although the mayor appointed the initial Board of Directors, all subsequent directors were selected by the Board of Directors, not by the Mayor. In your situation, the Mayor is the appointing authority under the License Agreement and the Corporation Bylaws. We must consider whether the Mayor’s appointment power provides a sufficient indication of control to constitute governmental control.

In previous Commission opinions, one of the significant measures of control has been the presence of a majority voting block appointed by a government official on the board of directors of a non-profit corporation. *See e.g., EC-COI-91-12*; *89-24*; *89-1*. However, the Supreme Judicial Court, in its interpretation of our jurisdictional test, has indicated that, in addition to voting power, “the issue of control must be considered in the context of each board member’s role as a fiduciary...” *MBTA Retirement Board*, 414 Mass. at 592.

Other than his appointment power, the Mayor has not been given any decision-making role in the Corporation and the Board is not required to report its actions to the Mayor. *See EC-COI-93-2* (no control or supervision over Board decisions); *compare EC-COI-88-24* (members of Board take action upon instruction from government personnel). We note that, under the bylaws, although the Board may not appoint subsequent members, it may, by majority vote, remove a member (a mayoral appointee), with or without cause. This provision provides some evidence of the Board’s independence from the Mayor’s Office. Under the Corporation bylaws, the Corporation has full authority to manage its affairs. Given the Board’s autonomy in managing its affairs and the limited participation by the Mayor, we conclude that the Board’s primary loyalty lies with the Corporation and with the cable subscribers, and that the Board members owe a fiduciary duty to the Corporation. *See MBTA Retirement Board*, 414 Mass. at 592 (Board members, as trustees, owe primary loyalty to beneficiaries of retirement fund, not to MBTA).

In conclusion, we do not find that the level of control exercised by the Mayor in appointing the Board is sufficient to outweigh our conclusions under the other jurisdictional factors. Because the Corporation was not created by statute or regulation, does not perform an essential governmental function, does not receive or expend governmental funds, and has authority to manage its own affairs without direction from a City agency, we conclude that the Corporation is not a “municipal agency” for purposes of the conflict of interest statute, and that Corporation employees are not municipal employees subject to the conflict law.

DATE AUTHORIZED: January 18, 1995

⁴The city has established a separate cable oversight board, which is a municipal agency. This board serves as the city’s liaison with the cable company and addresses issues of concern to cable consumers.

²The City Solicitor's Office now informs us that it believes that the Corporation is a private corporation, not subject to the conflict law.